Supreme Court, U.S.
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No. 88-1421

IN THE

Supreme Court of the United States

October Term, 1988

PETE MONDOZZI,
Petitioner,

vs.

AKRON BOARD OF EDUCATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

WARREN W. GIBSON, *Counsel of Record*
KENNETH L. GIBSON
WEICK, GIBSON & LOWRY
234 West Portage Trail
P.O. Box 535
Cuyahoga Falls, Ohio 44221
(216) 929-0507
Attorneys for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

I.

QUESTIONS PRESENTED

I. Do the standards of proof and the presumptions set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973) apply in ADEA cases?

II. Is evidence that the proffered business justification is objectively untrue sufficient to create an issue of fact thereby defeating the employer's motion for summary judgment?

III. Is it error for a court on motion for summary judgment to presume that simply because the promotion decision was made by persons who were themselves within the protected class that no discriminatory intent can be inferred?

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No. _____

IN THE

Supreme Court of the United States

October Term, 1988

PETE MONDOZZI,
Petitioner,

vs.

AKRON BOARD OF EDUCATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

The petitioner Pete Mondozzi respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The opinion of the Court of Appeals appears in the Appendix. It is not reported and that fact is reflected in 863 F.2d 49. The opinion of the District Court for the Northern District of Ohio is unreported and appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 29, 1988, and this petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. 623. Prohibition of age discrimination

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individuals age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

. . .

STATEMENT OF THE CASE

This is an Age Discrimination in Employment Act (ADEA) case on petition from a Sixth Circuit Court of Appeals decision affirming summary judgment in the trial court for the defendant-employer. Petitioner's Complaint alleged age discrimination as a determining factor in a decision by the Respondent, Akron Board of Education, to promote a much younger and less qualified applicant to the position of Coordinator over the Diversified Cooperative Training (DCT), Occupational Work Adjustment (OWA), Occupational Work Experience (OWE) and Distributed Education (DE) programs.

Upon completion of discovery, the Respondent filed a Motion for Summary Judgment (with exhibits attached) contending that Petitioner had failed to establish a *prima facie* case and that age was not a determining factor in the selection process. The Petitioner responded with his affidavit and deposition transcripts.

The District Court, after analysis of this evidence, concluded that there was "no evidence that the Plaintiff was rejected for the promotion to the position of Coordinator 'under circumstances which give rise to an inference of unlawful discrimination.' " The decision was based upon Sixth Circuit authority which rejects application of Title VII standards of proof as set out in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973) to ADEA cases.

The Sixth Circuit Court of Appeals affirmed on the opinion of the District Court and a timely Petition for Certiorari was filed.

STATEMENT OF FACTS

The Respondent posted a notice of opening for the position of Coordinator on December 19, 1985. The notice set forth the qualifications necessary for the position. Petitioner and 11 others applied for the position.

At the time of the promotion decision, the Petitioner was 53 years of age and met all of the qualifications set out in the posting. The person promoted was 36 years of age and did not have a master's degree in education which was the first qualification specified in the posting.

Each of the applicants was scheduled for an interview before a screening committee. During his interview the Petitioner was asked by the Chairman of the screen committee, "Mr. Mondozzi, I know you have been around a good number of years. . . . I know that you are close to retirement, Mr. Mondozzi, if you receive the job, how long can we expect you to stick around?" The screening committee narrowed the 11 applicants to 3 (Lawson, Maglione, and Barrett). Petitioner was not selected. The 3 who were selected were all younger and less qualified than the Petitioner. The 3 finalists were listed in order of preference by the committee. The order of preference mirrored the order of ages, with the first preference being the youngest of the 3 and the last preference going to the oldest of the 3. The youngest was selected for the position.

REASONS FOR GRANTING THE WRIT

I. *McDonnell Douglas*[1] standards of proof apply in ADEA cases.

This case presents the opportunity to resolve a longstanding split in the Circuits relating to the applicability of the Title VII standards of proof set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973) to ADEA cases.

The Sixth Circuit has consistently refused to apply the *McDonnell Douglas* standards of proof in an age discrimination context. *Laugesen v. Anaconda Company*, 510 F.2d 307, 311-12 (6th Cir. 1975); *Sahadi v. Reynolds Chem. Corp.*, 636 F.2d 1116, 1118 (6th Cir. 1980); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th Cir. 1982); *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1179-80 (6th Cir. 1983); *Rose v. National Cash Register Corp.*, 703 F.2d 225, 227 (6th Cir. 1983); *LaGrant v. Gulf & Western Manufacturing Co.*, 748 F.2d 1087, 1090 (6th Cir. 1984); *Dabrowski v. Warner-Lambert Co.*, 815 F.2d 1076, 1080 (6th Cir. 1987); *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 940-41 (6th Cir. 1987).

Every other Circuit which has considered the question has rejected the Sixth Circuit approach and has held that the *McDonnell Douglas* standards of proof apply in ADEA cases. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1011-12 (1st Cir. 1979); *Chippollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 897-98 (3rd Cir. 1987), *en banc*; *Sorba v. Pennsylvania Drilling Co., Inc.*, 821 F.2d 200, 202 (3rd Cir. 1987); *Smith v. Flax*, 618 F.2d 1062, 1066 n.3 (4th Cir. 1980); *Smith v. University of North Carolina*, 632 F.2d 316, 332 (4th Cir. 1980); *Elliott v. Group Medical & Surgical Service*, 714 F.2d 556, 564 n.9

[1] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

(5th Cir. 1983); *Thornbrough v. Columbus and Greenville Railroad Co.*, 760 F.2d 633, 638-39 text and n.4 (5th Cir. 1985); *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1504-05 (5th Cir. 1988); *Oxman v. WLS-TV*, 846 F.2d 448, 452-53 (7th Cir. 1988); *Hillebrand v. M-Tron Industries, Inc.*, 827 F.2d 363 (8th Cir. 1987); *Douglas v. Anderson*, 656 F.2d 528, 531-33 (9th Cir. 1981); *Schwager v. Sun Oil Co. of Penn.*, 591 F.2d 58, 60-61 (10th Cir. 1979); *Delgado v. Lockheed-Georgia Co.*, 815 F.2d 641, 644 (11th Cir. 1987); *Rollins v. TechSOUTH, Inc.*, 833 F.2d 1525, 1528-29 (11th Cir. 1987).

The split among the Circuits on this question has been widely noted in the cases and literature concerning the ADEA. See, e.g. *Thornbrough v. Columbus and Greenville Railroad Co., supra*, 760 F.2d at 638-9 n.4; *Schwager v. Sun Oil Co. of Penn., supra*, 591 F.2d at 60; and Comment, *Adjudicating ADEA Disparate Treatment Claims Within the Evidentiary Framework of Title VII: An Order of Proof for Age Discrimination Cases*, 32 Catholic University L. Rev. 865, 881 (1982-83).

The Sixth Circuit's position is inconsistent with this Court's admonition, in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756, 99 S. Ct. 2066, 2071, 60 L. Ed. 2d 609 (1979), to construe Title VII provisions consistently with ADEA provisions. The original draft version of Title VII included age discrimination provisions, but these provisions were deleted pending further study. After the study was completed, Congress incorporated the substantive provisions of Title VII almost verbatim into the ADEA. It is this legislative history which has led courts to construe Title VII consistently with the ADEA. See, Note, *The Age Discrimination in Employment Act of 1967*, 90 Harv. L. Rev. 380 (1976) and *Elliott v. Group Medical & Surgical Service, supra*, 714 F.2d at 557 n.1. The Sixth Circuit position ignores this legislative history.

Laugesen v. Anaconda Company, 510 F.2d 307 (6th Cir. 1975), cited two reasons for not applying the *McDonnell Douglas* standards of proof in ADEA cases: (1) the shifting burdens and presumptions would be inappropriate in jury cases, and, (2) the presumption arising from replacement of an older employee with a younger one is not as strong as the presumption associated with Title VII classes. The first concern has not proven to be a problem in the nine Circuits which apply *McDonnell Douglas* standards of proof in jury cases. The second argument is nothing more than judicial reluctance to give the same importance to age discrimination as to other classes of discrimination, a reluctance which is not supported by any basis in Congressional language or intent. Even in the Sixth Circuit, the refusal to apply the *McDonnell Douglas* standards of proof is not without dissent. See, *Locke v. Commercial Union Insurance Co.*, 676 F.2d 205 (6th Cir. 1982) (dissenting opinion of Nathaniel R. Jones).

It is time for this Court to reconcile this conflict in the Circuits. It is time for the older citizens of Ohio, Michigan, Kentucky, and Tennessee to have the same rights and the same entitlement to presumptions as the citizens of other states in the enforcement of the ADEA.

In an age discrimination context a Plaintiff establishes a *prima facie* case when he shows (1) he is a member of the protected class (over 40 years of age), (2) he applied for and is qualified for a position for which the employer is seeking applicants, (3) he was rejected despite his qualifications, and (4) a person sufficiently younger to allow an inference of age discrimination is hired. *McDonnell Douglas, supra. Smithers v. Bailar*, 629 F.2d 892, 895 (3rd Cir. 1980).

In the case at bar, the evidence established all of these elements. Thus, the Plaintiffs, under the *McDonnell Douglas* formula had established a *prima facie* case. However, the District Court found that these circumstances were insufficient to give rise to an inference of unlawful discrimination. Under the *McDonnell Douglas* formula such an inference would be mandatory.

The conflict issue is thus squarely presented. Application of the *McDonnell Douglas* standards of proof would have resulted in a finding that Petitioner had established a *prima facie* case of age discrimination in every Circuit but the Sixth.

II. Any evidence tending to show that the proffered business justification is objectively untrue is sufficient to reestablish the presumption and defeat a motion for summary judgment.

A split of authority also exists with respect to the means by which the age discrimination plaintiff can show that the employer's reasons are pretextual, especially in the context of an employer's motion for summary judgment. The First Circuit has held that mere proof that the business justifications were objectively untrue is insufficient to reestablish the presumption afforded by proof of a *prima facie* case. *White v. Vathally*, 732 F.2d 1037, 1042 (1st Cir., 1984). See also, *Smith v. Flax*, *supra*, 618 F.2d at 1066-67; and *Bienkowski v. American Airlines, Inc.*, *supra*.

On the other hand, most courts have held that (1) proof that the proffered reason is objectively untrue is sufficient to reestablish the original presumption and (2) that evidence challenging the truth of the proffered business justification is sufficient to defeat a motion for summary judgment or a motion for directed verdict.

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 718, 103 S. Ct. 1478, 1483, 75 L. Ed. 2d 403 (1983), (Blackmun, J., concurring); *Chippollini v. Spencer Gifts, Inc., supra*, 814 F.2d at 900; *Sorba v. Pennsylvania Drilling Co., Inc., supra; Delgado v. Lockheed-Georgia Co., supra; Hillebrand v. M-Tron Industries, Inc., supra; Oxman v. WLS-TV, supra; Rollins v. TechSOUTH, Inc., supra.*

A typical formulation of the latter rule is set out in *Thornbrough v. Columbus and Greenville Railroad Co., supra*, 760 F.2d at 639, dealing with the means by which a plaintiff can rebut the employer's business justification claim:

> The plaintiff can do this in two ways, "either [1] directly by persuading the court that a discriminatory reason more likely motivated the employer or [2] indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256, 101 S.Ct. at 1095; see also Bohrer v. Hanes Corp., 715 F.2d 213, 218 (5th Cir. 1983), cert. denied, _____ U.S. _____, 104 S.Ct. 1284, 79 L.Ed.2d 687 (1984). The first of these alternatives is the alternative that is always open to the plaintiff in an employment discrimination case: producing "evidence from which a trier of fact might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." Elliott, 714 F.2d at 562. *The second, however, depends upon the resurrection of the presumption initially created by the plaintiff's prima facie case. By disproving the reasons offered by the employer to rebut the plaintiff's prima facie case, the plaintiff recreates the situation that obtained when the prima facie case was initially established: in the absence of any known reasons for the employer's decision, we presume that the employer was motivated by discriminatory reasons.*

Thornbrough v. Columbus and Greenville Railroad Co., supra at _____ (emphasis added).

In *Elliott v. Group Medical & Surgical Service, supra*, 714 F.2d at 566, similar reasoning was applied:

> When no more evidence of discrimination is presented than that of these plaintiffs and the defendant presents evidence justifying and explaining the discharge, the trier of fact is not free to disregard that explanation without countervailing evidence that it was not the real reason for the discharge. *Such evidence may take the form of an attempted showing that the reason given by the employer, though facially adequate, was untrue as a matter of fact or was, although true, a more cover or pretext (emphasis added).*

The position, that proof that the business justification offered by the employer is objectively untrue reinstates the presumption, is compelling. If proof of discharge, or failure to hire, a qualified person in the protected class in favor of someone not within the protected class is sufficient to create a rebuttable presumption of discrimination, the presumption is strengthened rather than rebutted if the trier of fact finds that the business justifications were objectively untrue.

In the case at bar, the District Court never got past the issue of Petitioner's *prima facie* case. In the record, however, Respondent proffered, as its nondiscriminatory justification, the Petitioner's lack of communication and organizational skills. The Petitioner responded with evidence that he was a former sergeant in the Marine Corps, a classroom teacher for 25 years, a Teacher/Coordinator for the OWE program, and the author of a book on the creation of the OWA, OWE program. Thus, Petitioner offered evidence directly challenging the assertion that he lacked communication and organizational skills.

Furthermore, communication and organizational skills were not identified as job qualifications on the posting (App. p. A14). One of the qualifications in the posting, Petitioner was the most qualified in virtually every area. The candidate selected did not meet the qualifications either as to possession of a master's degree or as to academic or supervisor certifications.

This evidence alone was sufficient to create a disputed issue of fact. However, in addition, the Petitioner presented direct evidence of age discrimination when he testified in his deposition that the chairman of the selection committee stated in the interview conducted for this position, "Mr. Mondozzi, I know you have been around a good number of years. . . . I know that you are close to retirement, Mr. Mondozzi, if you receive the job, how long can we expect you to stick around?" Moreover, the ranking of candidate preferences in the same order as their respective ages was further circumstantial evidence of age discrimination.

The quantum and kind of evidence in this case is typical of age discrimination cases. There is rarely direct evidence of discrimination and there is almost always a proffered business justification. Many of the cases actually going to trial result in jury verdicts for the plaintiff. However, especially in the Sixth Circuit, the standards of proof applied on motion for summary judgment or directed verdict preclude meritorious cases from going to the jury.

While at trial the burden on the employer is only to articulate nondiscriminatory business reasons for its action (*Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 248, 101 S. Ct. 1089, 1091, 67 L. Ed. 2d 67 (1981)), the burden is greater when the employer is seeking summary judgment or directed verdict. Under those circumstances the burden is on the employer to establish that a jury could not reasonably find that age discrimination was a determining factor in his discharge. *Douglas v. Anderson*, 656 F.2d 528, 533 (9th Cir. 1981). *Chippollini v. Spencer Gifts, Inc., supra*, 814 F.2d at 900.

Courts need to be particularly careful in granting summary judgment on the pretext issue because the issue of pretext is primarily an issue of credibility of the employer's witnesses. *Thornbrough v. Columbus and Greenville Railroad Co., supra*, 760 F.2d at 633; *Bienkowski v. American Airlines, Inc., supra*, 851 F.2d at 1507. Frequently the issue of pretext is addressed by an effective cross-examination. (A cross-examination which is less effective for trial purposes if fully conducted in discovery depositions.) Additionally, the issue of pretext is frequently raised by pointing out inconsistencies in the testimony of various witnesses and their demeanor. *Sorba v. Pennsylvania Drilling Company, supra*, 821 F.2d at 205. If the jury exercises its prerogative to disbelieve the proffered explanation of the employer, then the *prima facie* case and corresponding presumptions remain.

Again, this case presents the opportunity to resolve this conflict among the Circuits and unify the construction and application of the ADEA in these important areas.

III. It is error for a court, on a motion for summary judgment, to presume that simply because the decision was made by persons who were themselves within the protected class that no discriminatory intent can be inferred.

The District Court weighed heavily the facts that several members of the selection committee were themselves within the protected class and that two of the selections were made of individuals within the protected class. Neither of these inferences was proper in considering the employer's motion for summary judgment.

No evidence exists, and there certainly was none before the District Court, that persons within the protected age classifications are class conscious. Historically, more age conscious employment decisions are made by upper executives in the protected age group, than are by middle executives outside the class. There simply is no adequate basis for an inference that older employers are less likely to be guilty of age discrimination than younger employers.

Further, while the selection of candidates from within the protected class may have some significance, that significance is extremely minimal where the selected candidates were younger than the Petitioner and where the evidence shows that even the candidates who were selected were ranked in order of preference according to their respective ages. The District Court created a presumption without basis in law or fact, which if broadly applied could threaten to undermine the effective enforcement of the ADEA.

CONCLUSION

This is an appropriate case for the Court to resolve two areas of longstanding conflict among the Circuits in the application of standards of proof and the presumptions which apply in ADEA cases. The fact pattern in this case is typical. In fact, in almost every case, the employer files a motion for summary judgment, yet the application of the burden-shifting analysis set forth in *McDonnell Douglas* is in need of clarification and reconciliation among the Circuits in the context of an employer's motion for summary judgment. The conflict precludes uniform application of the ADEA and ensures employer victory in virtually every case. Therefore, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

WARREN W. GIBSON, *Counsel of Record*
KENNETH L. GIBSON
WEICK, GIBSON & LOWRY
234 West Portage Trail
P.O. Box 535
Cuyahoga Falls, Ohio 44222
(216) 929-0507
Attorneys for Petitioner

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed November 29, 1988)

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION]

No. 88-3134

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETE MONDOZZI,
Plaintiff-Appellant,

vs.

AKRON BOARD OF EDUCATION,
Defendant-Appellee.

ORDER

Before: LIVELY, *Chief Judge;* WELLFORD, *Circuit Judge;* and PECK, *Senior Judge.*

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof.

IT IS ORDERED that the judgment of the District Court be, and it hereby is, AFFIRMED upon the opinion of the district court.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN, *Clerk*
/s/ LEONARD GREEN

JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT

(Filed February 1, 1988)

Case No. C87-1631A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PETE MONDOZZI,
Plaintiff,

vs.

AKRON BOARD OF EDUCATION,
Defendant.

JUDGMENT ENTRY

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the motion of the defendant for summary judgment is granted. This case is hereby dismissed.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT

(Filed February 1, 1988)

Case No. C87-1631A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PETE MONDOZZI,
Plaintiff,

vs.

AKRON BOARD OF EDUCATION,
Defendant.

MEMORANDUM OPINION

INTRODUCTION

This is a case in which the plaintiff alleges that he was discriminated against on account of his age, over 40, by his employer the defendant Akron Board of Education, when the Board rejected his application for promotion to the supervisory position of Coordinator, Diversified Cooperative Training, Marketing Education, Occupational Work Adjustment and Occupational Work Experience for the Akron City Schools in favor of a younger man, Howard Lawson, under the age of 40 with less qualifications. The defendant has filed a motion for summary judgment which is granted for the reasons that follow.

FACTUAL BACKGROUND

The plaintiff had been employed by the defendant since December of 1961. After teaching for approximately nine years, the plaintiff accepted the position of Occupational Work Adjustment (OWA) teacher/coordinator in 1970. In 1974, the plaintiff transferred to the position of teacher/coordinator in the Occupational Work Experience (OWE) program at Buchtel High School and continued to hold that position until the vacancy in the job of Coordinator for the four work/study co-op programs opened in December of 1985 when the then current Coordinator, Stanley Gustely, retired.

The defendant Board then advertised the opening and a number of applications were received, including the plaintiff's. A Screening Committee of school employees was established which included Charles Maggio as Chairman and Director of Professional Employment, Robert Hughey, the Director of Vocational Education to whom the Coordinator reports, Stanley Gustely, Phyllis Lerch, a personnel representative, and Fred Gissendaner, a senior high principal. The Screening Committee was given the responsibility of interviewing the applicants, with the mandate to refer the three top applicants from the pool to the deputy superintendent of schools with the understanding that the person selected would come from the three names submitted. Four of the members of the Screening Committee were older than the plaintiff (52 at the time), as Maggio was 55, Gustely 59, Lerch 54 and Hughey 55. The Screening Committee developed a list of questions to put to the applicants and then conducted interviews of the applicants on a single day in fifteen minute interviews. At the conclusion, the five members of the committee separately ranked the applicants and the collective judgment of the Screening Committee

resulted in the recommendation of Lawson (38), Thomas Maglione (47) and Jane Barrett (51). Of the remaining applicants who were not recommended for the position, at least three were under the age of 40. Lawson was unanimously chosen as one of the three finalists by the members of the Screening Committee, and the consensus of the committee was that Lawson was the top choice. Lawson was then selected by the Deputy Superintendent for the interim appointment and then the permanent appointment for the position of Coordinator.

PLAINTIFF'S POSITION

The plaintiff admits that Lawson was qualified for the position of Coordinator, but contends that because Lawson was the youngest qualified candidate, age was a determining factor in Lawson's selection (Mondozzi Deposition, pp. 75-77).

ANALYSIS OF THE PROCESS EMPLOYED BY THE BOARD

It is certainly not uncommon that where opportunities for promotion arise in large organizations such as the school system operated by the Akron Board of Education that some, but not all, of the applicants for promotion will be in the protected age group of 40 or older. Application of the principles being hammered out in litigation arising by reason of the Age in Discrimination Employment Act is troublesome where there are multiple applicants for a single promotion and some of the applicants are in the protected age group.

In this setting, the defendant Board of Education employed the following plan designed apparently to eliminate age as a factor in the promotional process:

1. Announced the opening and gave full opportunity to apply.
2. Published a complete job description.
3. Established a Screening Committee dominated by persons in the protected age group.
4. Provided that the Screening Committee use a process which included:
   a. Developing prior to the interviews a standard list of questions for the applicants.
   b. An opportunity for a 15 minute interview of each applicant with the applicants being offered the opportunity to select the time for the interview.
   c. Providing for a discussion among the Screening Committee members after the interviews were completed.
   d. A separate ranking of the applicants by each member of the Screening Committee.
   e. The presentation to the deputy superintendent of a list of the top three applicants as determined by the consensus voting of the members of the Screening Committee.

ARE THERE INFERENCES OF DISCRIMINATION THAT DEFEAT SUMMARY JUDGMENT?

The plaintiff's burden in this case to defeat summary judgment at the *prima facie* stage is to establish that he applied for the promotion, was within the protected class, was qualified for the promotion, but was rejected " 'under circumstances which give rise to an inference of

unlawful discrimination.' " *Grubb v. W.A. Foote Memorial Hosp. Inc.*, 741 F.2d 1486, 1497-1498 (6th Cir. 1984) (*quoting* passage from *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

In opposing summary judgment, the plaintiff contends that facts exist which support an inference of unlawful discrimination which prevented the plaintiff from receiving the promotion, notwithstanding the process employed by the defendant in selecting the new Coordinator.

PLAINTIFF'S INFERENCE CLAIMS

A. *Lawson did not have a Master's Degree.*

The plaintiff claims that Lawson, the selectee for the position, did not, as did the plaintiff, hold a master's degree. However, the records of the defendant indicate that Lawson had the equivalency of a Master's Degree as of October, 1984, and further, that the position of Coordinator did not require academic certification. See Hughey affidavit. No inference of age discrimination can be found with respect to Lawson's academic qualifications.

B. *Lawson was the pre-selection choice of his predecessor and member of the Screening Committee, Gustely.*

The plaintiff points to the deposition testimony of Stanley Gustely for the proposition that Gustely favored Lawson and to that end, the selection process was flawed as a part of a process to discriminate against the plaintiff on account of his age.

The deposition testimony follows:

Q. Did you know Mr. Lawson?

A. Yes, I did.

Q. Did you tell Mr. Lawson about your pending retirement?

A. Yes, I'm sure I did, like anyone else.

Q. Do you know when you first talked to Mr. Lawson about that subject?

A. I think probably about a year or two before I retired or so, I said, you know, "Mr. Lawson, I think that's one job you can handle when the time comes, apply for it." I felt that about anybody.

Q. As I understand it, in that conversation—and I'm suggesting it, you can correct me if I'm wrong—that conversation, then, to Mr. Lawson, indicated, "Well, what do you think I ought to do about maybe being acceptable to the administration down there."

A. I don't remember anything like that at all, not a thing.

Q. Did you give him any advice as to what he might do in order to enhance his chance of getting the position?

A. I don't recall that, except, "Be yourself," If anybody else asked me, I'd say, "Be yourself. Don't try and con people," that's all. When you go to an interview, having six or five or four other people on it besides me, I didn't know I was even going to be on the interview committee, even. I said, "You have to go by how you present yourself."

Gustely Deposition, pp. 27-28 (docket #30).

The Court finds no inference that could be drawn from the Gustely testimony that would give rise to an inference of age discrimination.

C. *The interview process was a sham and calculated to endorse Mr. Lawson as the defendant's favored candidate.*

In support of the claim that the interview process conducted by the Screening Committee constituted a sham, the plaintiff points to the following:

1. Member Lerch did not stay to participate in all the interviews, citing page 10 of the Lerch deposition. The Lerch deposition has not been filed with the clerk nor is any extract of that deposition submitted.

2. None of the committee members consulted with one another following completion of the interview process. No citation is made in support of this claim, but the deposition testimony of the chairman of the Screening Committee, Mr. Maggio, indicates that the members consulted with one another as the interview process was conducted. See Maggio Deposition, p. 9, lines 17-22.

3. The members of the Screening Committee did not remember reviewing the personnel files, citing Hughey Deposition p. 31 and Gissendaner Deposition p. 8. Member Hughey stated that it was usual procedure to review the files but he could not remember as to the particular case. Hughey Deposition, pp. 17-18 and 31. However, members Gustely and Maggio did recall reviewing the personnel folders. (Gustely Deposition, p. 66 and Maggio Deposition, p. 9). The Gissendaner deposition has not been filed with the clerk.

4. The letters of recommendation offered by plaintiff Mondozzi were not seen by the members of the Screening Committee, nor were they placed in Mondozzi's file. No citation to the record is offered for this assertion.

The Court finds from a review of the depositions that plaintiff's characterization of the interview process as a sham is not supported.

D. *The successful candidate Lawson had been pre-selected and was told that he had the job so that the entire process was a sham designed to cover up the choice of Lawson.*

The plaintiff has submitted his affidavit in support of this claim. The affidavit reads as follows:

> Shortly after I applied for the position of Coordinator of OWA, OWE, ME, and DCT, I was told by several people that a selection had already been made. I learned that the selection of Howard Lawson was a foregone conclusion; that he was Mr. S. Gustely's favorite; and that it was useless to apply. In fact, these people told me that they did not apply for the position, or they withdrew their applications because they knew that Lawson was going to get the job.
>
> The younger Lawson had expressed an interest in the position early on and ingratiated himself with the older Mr. Gustely in order to assure his eventual selection as Coordinator.

The affidavit of Mr. Mondozzi contains hearsay that would not be admissible in court unless used to impeach. Moreover, the sources of the information about the "foregone conclusion" are not identified, nor is the basis for the conclusion revealed in the affidavit. Put simply, the affidavit of Mr. Mondozzi does not present evidence of the quality required by the provisions of Rule 56(e) of the Federal Rules of Civil Procedure.

In sum, there is no evidence of the type admissible in court from which the jury could reasonably infer that Mr. Lawson was pre-selected and that the interview-screening committee process was a sham.

E. *The Screening Committee's selection of Barrett and Maglione (within the protected class) as two of the three finalists was done to assure Lawson's appointment by eliminating the plaintiff from the list of three in spite of the fact that the plaintiff was more qualified than either Barrett or Maglione.*

F. *The position of the members of the Screening Committee to the effect that the plaintiff lacked communication skills resulting in his failure to make the list of three finalists constitutes pretextual rationalization.*

The plaintiff, in an attempt to deal with the fact that the process that he labels discriminatory against him on the basis of his age produced a list of three finalists, two of whom were in the protected class, contends that the fact finder could find that the placement of Barrett and Maglione on the list of three was designed to ensure the selection of Lawson. The plaintiff reasons that Barrett and Maglione were less qualified than the plaintiff and that the communication deficiency advanced by the individual members of the screening committee to explain the plaintiff's absence on the list of three is pretext.

It is readily apparent that effective communication skills are important to the role of the Coordinator. The evaluation of competing communication skills is highly subjective. Accordingly, the process employed by the defendant in evaluating the competing candidates, some

within and some without the protected class, takes on added significance. It is obvious that the promotion process can be manipulated to reach a desired end, but the more persons employed in the process, the more difficult the manipulation becomes.

Here, the plaintiff has had the opportunity to depose the individual members of the Screening Committee. No evidence of conspiracy to manipulate the process so as to discriminate against the plaintiff has surfaced. The members of the Screening Committee have articulated their respective reasons for not placing the plaintiff on the list of three. Their articulated reasons are anchored in their assessment of the plaintiff's communication skills and leadership abilities. The committee members have likewise articulated their reasoning in selecting Barrett and Maglione.

The Court finds no evidence submitted by the plaintiff which would support a jury finding of discrimination against the plaintiff in the process which eliminated him from the list of three submitted to the deputy superintendent. To submit the issue of age discrimination in this case to a jury, based upon the state of the record and the suggested inferences submitted and argued by plaintiff's counsel, would inevitably equate with the proposition that in every multi-application for a single promotion process involving applicants in the protected class, a promotion of an applicant from without the class would subject the employer to a trial by jury where the jury would be permitted to speculate concerning the process in the context of age discrimination. Such is not the state of the law.

Anderson v. Liberty Lobby, Inc., _____ U.S. _____, 106 S. Ct. 2505, 2511 (1986) teaches:

> [T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. (Citations omitted).

After reviewing the evidence submitted in a light most favorable to the plaintiff, the non-moving party, the Court finds, in the context of the mandate found in *Grubb v. W.A. Foote Memorial Hospital, Inc., supra*, no evidence that the plaintiff was rejected for the promotion to the position of Coordinator "under circumstances which give rise to an inference of unlawful discrimination."

The motion of the defendant for summary judgment is granted.

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

AKRON PUBLIC SCHOOLS

Division of Personnel and Administration

December 19, 1985

APPLICATION FOR *INTERIM* VACANCY AS A:

Coordinator, Diversified Cooperative Training, Marketing Education, Occupational Work Adjustment and Occupational Work Experience.

Applications are being accepted in the office of Mr. D. E. Dominic, Deputy Superintendent, Personnel and Administration, for the position of Coordinator, D.C.T., M.E., O.W.A., and O.W.E., Job Code 076, Time Schedule 522, Salary Ratio 1.30 for the 1985-1986 school year. This will be an *interim* appointment only.

QUALIFICATIONS:

1. Masters Degree in Education.
2. Preferred training in one of the following areas:
   - —School counseling and guidance.
   - —Special Education, including preparation for working with the academically less able student.
   - —Vocational and/or Industrial Arts Education.
   - —Marketing Education.
   - —Social studies or related subjects.
3. Minimum of five years teaching experience in one or more of the following areas:
   - —Vocational Education.
   - —Special Education.
   - —Industrial Arts Education.
   - —Business and/or Merchandising Education.
   - —Sociology.

—Low ability student programs.
—Inner-city youth programs.
—Disadvantaged youth programs.

4. A minimum of twelve months of gainful employment experience in one or more occupations outside of public education.

5. Meet state supervisor certification requirements.

6. Have knowledge and interest in working with the low or under achiever or potential school dropout student.

7. Have knowledge and interest in programs to train students in areas of sales and merchandising.

POSITION DESCRIPTION:

- Works with and is directly responsible to the Director of Vocational Education and Industrial Arts.

Coordinator, D.C.T., M.E., O.W.A., and O.W.E.

- Organizes, develops, and supervises the D.C.T., M.E., O.W.A., and O.W.E. programs for the Akron Public Schools.
- Conducts administrative evaluations of D.C.T., M.E., O.W.A., and O.W.E. teachers.
- Interviews teacher applicants for D.C.T., M.E., O.W.A., and O.W.E. teaching positions and advises the Personnel Department as to applicant's qualifications.
- Assumes responsibility for D.C.T., M.E., O.W.A., and O.W.E. curriculum development in order to provide an on-going program of curriculum revision and improvement.

- Assumes responsibility for a continuing program of public relations and program promotion for D.C.T., M.E., O.W.A., and O.W.E. programs.
- Makes recommendations for the purchase and distribution of equipment, teaching materials, and supplies used in the D.C.T., M.E., O.W.A., and O.W.E. programs.
- Advises school principals and other school personnel regarding State and Local Vocational Department requirements for program facilities, class schedules, and teacher responsibilities in D.C.T., M.E., O.W.A., and O.W.E. programs.
- Supervises the installation, repair, and inventory of equipment for the D.C.T., M.E., O.W.A., and O.W.E. programs.
- Advises and serves on committees for school and community agency programs related to disadvantaged and/or school dropout pupils.
- Assumes responsibility for D.C.T., M.E., O.W.A., and O.W.E. programs to maintain linkages with the business and industrial community through advisory committee participation.

A letter of application containing a statement of the applicant's training, experience, and other qualifications should be directed to D. E. Dominic, Deputy Superintendent, Personnel and Administration, 70 North Broadway, Akron, OH 44308, and should be received on or before 5:00 p.m. on January 13, 1986.

AN EQUAL OPPORTUNITY EMPLOYER

AKRON PUBLIC SCHOOLS

. Maggio, Director
ional Employment and Certification

Date 2/3/86

INTERIM COORDINATOR - OWE, OWA
TUESDAY, FEBRUARY 4, 1986

1:00 - 3:15 P.M. John Huncey

3:15 - 3:30 P.M. Thomas Lower

3:30 - 3:45 P.M. Lindsey Hayes

3:45 - 4:00 P.M. Pete Mendozzi

4:05 - 4:20 P.M. Thomas Maglione

4:20 - 4:35 P.M. Willie Watts, Jr.

4:35 - 4:50 P.M. Frank Pichichero

4:50 - 5:05 P.M. John Jacobs, Sr.

5:15 - 5:30 P.M. Pat McDonald

5:30 - 5:45 P.M. Jane Barrett

5:45 - 6:00 P.M. William Brown

6:00 - 6:15 P.M. Edward Ubary

6:15 - 6:30 P.M. Dellett Howard Lawson, Jr.

APPENDIX P. 105

EXHIBIT 3

3332 Barrett 3
2223 Maglione 2
1111 Lawson 1

INTER-DEPARTMENTAL COMMUNICATION

Akron Public Schools
City of Akron

Mr. D. E. Dominic
Deputy Superintendent

Date: February 6, 1986

Subject

Dear Mr. Dominic:

The Screening Committee selected to meet with the applicants for the position of Interim Coordinator, Diversified Cooperative Training, Marketing Education, Occupational Work Adjustment and Occupational Work Experience, have completed their task.

On Tuesday, February 4, 1986, between 3:00 P.M. and 5:30 P.M., 11 candidates appeared for their screening interviews.

Many of them (4) could not meet the supervisory certification requirements and thus eliminated themselves. Of the remaining 7 candidates, who appear to be eligible for supervisory certification, 3 stood out among them. In the following order, the committee wishes to recommend for consideration, Mr. D. Howard Lawson, Mr. Thomas Maglione and Mrs. Jane Barrett.

All three acquitted themselves very well before the committee and would in all likelihood perform well in the position for which they have made application.

If you have any further questions, do not hesitate to contact me.

Sincerely,

CHARLES MAGGIO
CHARLES MAGGIO, Director
Professional Employment,
Substitute Services
and Certification

CJM:jlf

LAST NAME: Mondozzi

FIRST NAME: Pete

BIRTHDATE: 7/12/33

APS HIRE DATE: 9/61

YRS. CLASSROOM SERVICE: 25

CERTIFICATIONS: HS — 4 Yr.
Prov. — Comp.Soc.St. — Eff. 7-1-61
HS — 1 Yr. Temp. — English — Eff. 9-1-62
HS — 1 Yr. Temp. — English/History — Eff. 7-1-63
HS — 4 Yr. Prov. — Comp.Soc.St. — Eff. 9-1-65
HS — 8 Yr. Prof. — Comp.Soc.St. — Eff. 9-1-66
— English Added 9-13-71
— History/Govt. Added 10-27-71
Vocational — 1 Yr. Temp. — OWE — Eff. 9-1-70
HS Principal — 4 Yr. Prov. — Eff. 9-1-71
Vocational — 1 Yr. Temp. — OWA — Eff. 9-1-71
*Vocational — 4 Yr. Prov. — OWA — Eff. 9-1-72
Supervisor — 4 Yr. Prov. — Comp.Soc.St., Eng/Hist., Govt. — Eff. 9-1-72
HS — Permanent — Comp.Soc.St., Eng/Hist., Govt. — Eff. 9-1-73 (Issued 4-20-73)
Vocational — 1 Yr. Temp. — OWE — Eff. 9-1-74
HS Principal — 4 Yr. Prov. — Eff. 9-1-75
*Vocational — 4 Yr. Prov. — OWA/OWE — Eff. 9-1-72 (same certificate—OWE added sometime in 1975 or 1976 — exact date not known)
Supervisor — 4 Yr. Prov. — Comp.Soc.St., Eng/Hist., govt. — Eff. 7-1-76
Vocational — 8 Yr. Prof. — OWE/OWA — Eff. 7-1-76
HS Principal — 4 Yr. Prov. — Eff. 7-1-79
Supervisor — 4 Yr. Prov. — Comp.Soc.St., Eng/Hist.; Govt. — Eff. 7-1-80 (Issued 6-27-80)

Vocational — (Permanent — OWE, OWA — Eff. 7-1-82 (Issued 5-24-82)

HS Principal — 4 Yr. Prov. — Eff. 7-1-83 (Issued 6-2-83)

Supervisor — 4 Yr. Prov. — Comp.Soc.St., Eng/Hist., Govt. — Eff. 7-1-80 (Issued 6-27-80)

Supervisor — 4 Yr. Prov. — Comp.Soc.St., Eng/Hist., Govt. — Eff. 7-1-84 (Issued 7-11-84)

HS Principal — 4 Yr. Prov. — Eff. 7-1-87 (Issued 8-26-87)

LAST NAME: Lawson

FIRST NAME: Howard

BIRTHDATE: 12/4/50

APS HIRE DATE: 12/3/73

YRS. CLASSROOM SERVICE AT TIME OF APPLICATION IS: 12

CERTIFICATIONS: HS -- 4 Yr. Prov. — Bus.Ed. w/o SH — Eff. 9-1-73
Voc. — 4 Yr. Prov. — Dist. Ed. — Eff. 9-1-74
High School — 4 Yr. Prov. — Bus. Ed. w/o SH — Eff. 7-1-77
Voc. — 4 Yr. Prov. — Dist. Ed. — Eff. 7-1-78
High School — 4 Yr. Prov. — Bus. Ed. w/o SH — Eff. 7-1-83
Voc. — 4 Yr. Prov. — Dist. Ed. — Eff. 7-1-82 (Issued 6-8-82)
High School — 8 Yr. Prof. — Bus. Ed. w/o SH — Eff. 7-1-83
Voc. — 8 Yr. Prof. — Dist. Ed. — Eff. 7-1-83 (Issued 9-15-83)
Voc. Supv. — 4 Yr. Prof. — Supv. Dist. Ed. — Eff. 7-1-86 (Issued 12-3-86)

FILED
MAR 28 1989
JOSEPH F. SPANIOL, JR
CLERK

(2)

No. 88-1421

IN THE

Supreme Court of the United States

October Term, 1988

PETE MONDOZZI,
Petitioner,

vs.

AKRON BOARD OF EDUCATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DEAN E. WESTMAN, *Counsel of Record*
SUE M. DOUGLAS
BUCKINGHAM, DOOLITTLE & BURROUGHS
P.O. Box 1500
50 South Main Street
Akron, Ohio 44309
(216) 376-5300
Attorneys for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

23pp

STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the Petitioner in this individual action brought pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.*, presented the District Court with any evidence to create a genuine issue of material fact and thus preclude the grant of summary judgment for the Respondent.

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No. 88-1421

IN THE

Supreme Court of the United States

October Term, 1988

PETE MONDOZZI,
Petitioner,

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Both Petitioner's Statement of the Case and Statement of the Facts are riddled with inaccuracies and omissions of important facts. Respondent will, therefore, correct those inaccuracies and omissions by the following.

In 1980, Petitioner, then age 46, applied for promotion to the position of Coordinator, Diversified Cooperation Training (DCT), Distributive Education (DE), Occupational Work Adjustment (OWA) and Occupational Work Experience (OWE). The position of Coordinator, DCT, DE, OWA, OWE is a supervisory position within Respondent's Vocational Education department and involves essentially the coordination of the instructional programs for the four work/study co-op programs (DCT, DE, OWA, OWE). Petitioner was rejected as "not recommended" by the screening committee which recommended three other applicants for the position: Stanley Gustely, Jane Barrett, and Tim McGuckin. Stanley Gustely, then age 53, was eventually appointed to the position.

When Stanley Gustely subsequently announced his retirement in December, 1985, Petitioner, then age 52,[1] again applied for promotion to the position. Petitioner's application, along with those of all of the other applicants, was referred to a newly appointed screening committee for the position.

The screening committee interviewed 11 applicants for the Coordinator position, using a pre-established list of questions developed by screening committee members as a guideline for the interviews. The attributes which the screening committee was looking for in interviewing the applicants included, among others, the ability to communicate, organization skills, the ability to work with others, and demonstrated leadership through such activities as work on curriculum committees, assisting in setting up in-service programs, and/or assisting in micro-computer related programs or activities. Subsequent to

[1] In his brief, Plaintiff states that he was 53 at the time of his application. However, the record evidence before the courts below indicates that Petitioner was 52 years of age at that time.

the interviews, the screening committee, after discussion, reached a consensus on the top three applicants to be recommended for the position: Howard Lawson (age 36), Thomas Maglione (age 47), and Jane Barrett (age 51), one of the candidates previously recommended in the 1980 selection process. Petitioner was not among the top three applicants recommended for selection due to what the screening committee members perceived to be his relative lack of effective communication, organization, and leadership skills. Howard Lawson was unanimously recommended as the best applicant because, in addition to his communication and leadership skills, and extra-curricular activities, which the two other recommended applicants possessed, Lawson was a leader in working with fellow teacher/coordinators and developing programs, while additionally working extensively with micro-computers.

The Proceedings Below

Petitioner filed suit in the United States District Court for the Northern District of Ohio alleging he was rejected for promotion to the Coordinator position in 1986 because of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* (ADEA). At the close of extensive discovery, Respondent filed a motion for summary judgment asserting that no genuine issue of material fact existed and that Petitioner could neither prove a *prima facie* case of age discrimination, nor meet his ultimate burden of proving by a preponderance of the evidence that his age was a determining factor in his non-promotion. Respondent's motion was supported by deposition testimony and affidavits. After an in-depth analysis of the evidence and arguments presented by both parties, the District Court granted summary judgment for Respondent, finding that Petitioner was unable to establish a *prima facie* case of age discrimination, using the formulation announced by this Court in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981). The Court of Appeals for the Sixth Circuit affirmed the decision of the District Court without opinion.

SUMMARY OF ARGUMENT

The decision below does not conflict with the Court's established principles for analyzing cases alleging discrimination in employment. Similarly, the courts below correctly applied the Rule 56 standards for summary judgment which have been enunciated by this court. There are no important or special reasons for the Court to grant a writ of certiorari in this case. This appeal is merely a desperate attempt by an unsuccessful plaintiff to have his unsupported claims of age discrimination reviewed for yet a third time.

ARGUMENT REGARDING REASONS WHY THE WRIT SHOULD BE DENIED

I. The Decision Below Does Not Conflict With Principles Established By This Court.

The decision of the District Court for the Northern District of Ohio, affirmed by the Court of Appeals for the Sixth Circuit, merely applied existing principles regarding the burden of proof in employment discrimination cases that were first established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and further refined in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). Those cases set forth a three stage analysis of the burdens of production and persuasion in cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* While this Court has never decided the issue as to whether this three stage analysis should be applied to cases brought pursuant to the ADEA, every court of appeal, including the Sixth Circuit, has embraced this analysis for age claims. *See e.g., Riley v. University of Lowell*, 651 F.2d 822, 824 (1st Cir. 1981); *Pena v. Brattleboro Retreat*, 702 F.2d 322, 324 (2nd Cir. 1983); *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395-96 (3rd Cir.), *cert. denied*, 469 U.S. 1087 (1984); *EEOC v. Western Electric Co., Inc.*, 713 F.2d 1011, 1014 (4th Cir. 1983); *Reeves v. General Foods Corp.*, 682 F.2d 515, 520-24 (5th Cir. 1982); *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1180 (6th Cir. 1983); *Oxman v. WLS-TV*, 846 F.2d 448, 452 (7th Cir. 1988); *Leichihman v. Pickwick International*, 814 F.2d 1263, 1269 (8th Cir.), *cert. denied*, _____ U.S. _____, 108 S. Ct. 161 (1987); *Douglas v. Anderson*, 656 F.2d 528, 531 (9th Cir. 1981);

Schwager v. Sun Oil Company of Pennsylvania, 591 F.2d 58, 60-61 (10th Cir. 1979); *Anderson v. Savage Laboratories, Inc.*, 675 F.2d 1221, 1224 (11th Cir. 1982); *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 342 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983).

Petitioner incorrectly states in his Petition that the Sixth Circuit Court of Appeals has "consistently refused to apply the *McDonnell Douglas* standards of proof in an age discrimination context." While, in early cases decided under the ADEA, the Sixth Circuit questioned whether the three stage analysis should be presented to a jury for consideration, it has in later cases applied the analysis consistently. *See, e.g., Blackwell v. Sun Electric Corp.*, 696 F.2d at 1180; *Grubb v. W.A. Foote Memorial Hospital, Inc.*, 741 F.2d 1486, 1498 (6th Cir. 1984), *vacated on other grds. on rehearing*, 759 F.2d 546 (6th Cir.), *cert. denied*, 474 U.S. 946 (1985); *Ridenour v. Lawson Co.*, 791 F.2d 52, 55-56 (6th Cir. 1986); *Wilkens v. Eaton Corp.*, 790 F.2d 515, 520-521 (6th Cir. 1986); *Chappell v. GTE Products Corp.*, 803 F.2d 261, 265-66 (6th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987); *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 940-945 (6th Cir. 1987); *Cf. Loeb v. Textron*, 600 F.2d 1003, 1010 (1st Cir. 1979); *Smith v. University of North Carolina*, 632 F.2d 316, 334 (4th Cir. 1980).

Upon review of the cases cited by Petitioner, it is clear that what the Sixth Circuit has consistently refused to do is mechanically adopt, in cases involving discharged older workers, the four-part formulation set forth by this Court in *McDonnell Douglas* for establishing a *prima facie* case of hiring discrimination. That such an approach is in conflict with the approach of the other courts of appeals, however, is more illusory than real. Rather, by adopting such an approach, the

Sixth Circuit has merely followed the principles set forth by this Court in *McDonnell Douglas* and those cases further interpreting that decision.

When this Court first articulated the elements of a *prima facie* case in *McDonnell Douglas*, it recognized that "specification . . . of the *prima facie* proof required from Respondent is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802 n.13. *See also Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). (The *McDonnell Douglas* test "was never intended to be rigid, mechanized or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination"); *Aikens*, 460 U.S. at 715 (quoting *Furnco*). While in some of the cases cited by the Petitioner, the Sixth Circuit ultimately analyzed the evidence according to the *McDonnell Douglas* guidelines, each followed the principle set forth in *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312 (6th Cir. 1975), and first announced in *McDonnell Douglas*, that it is inappropriate to borrow the guidelines for a *prima facie* case and automatically apply them to differing factual situations, such as discharges of older workers, specifically during the course of an economic cutback. *See, e.g., Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 69 (6th Cir. 1982); *LaGrant v. Gulf & Western Mfg. Co., Inc.*, 748 F.2d 1087, 1090 (6th Cir. 1984); *Simpson v. Midland-Ross*, 823 F.2d at 940-41. *Accord Loeb v. Textron*, 600 F.2d at 1010; *Smith v. University of North Carolina*, 632 F.2d at 335, *Thornbrough v. Columbus Greenville R. Co.*, 760 F.2d 633, 641 (5th Cir. 1985); *Oxman v. WLS-TV*, 846 F.2d at 453; *Leichihman v. Pickwick International*, 814 F.2d at 1269; *Douglas v. Anderson*, 656 F.2d at 532-33; *Schwager v. Sun Oil Company of Pennsylvania*, 595 F.2d at 61 n.1.

In contrast to the cases cited by Petitioner in the Petition, the factual context before the District Court was not a discharge during an economic cutback, but a failure to promote during a multi-candidate, multi-stage selection process. The District Court conducted its analysis upon summary judgment according to the established *McDonnell Douglas* burden of production and persuasion. That the District Court never reached the second and third stages of the analysis was the result of its finding that the Petitioner failed to come forth with sufficient evidence to establish a *prima facie* case, *not* due to a rejection of the *McDonnell Douglas* three stage analysis.

In its determination of whether Petitioner was able to establish a *prima facie* case of age discrimination based upon Respondent's rejection of him for promotion in favor of three other candidates, the District Court applied the test set forth by the Sixth Circuit in *Grubb v. W.A. Foote Memorial Hospital*, 741 F.2d at 1497-98. In turn, in *Grubb*, the Sixth Circuit applied the *prima facie* formulation for promotion determinations set forth by this Court in *Texas Department of Community Affairs v. Burdine:* whether Petitioner set forth any evidence that he was rejected for promotion "under circumstances which give rise to an inference of unlawful discrimination." 450 U.S. at 253.

Each of the decisions of the courts of appeals in other circuits cited by Plaintiff applied *prima facie* case formulations in the context of discharges from employment. Petitioner has cited no cases which apply a *prima facie* case formulation in the context of a rejection for promotion in a multi-candidate, multi-stage process which conflicts with that of the Sixth Circuit or this Court. Thus, the first reason raised by Petitioner for this Court to review the decision of the District Court has no merit.

II. No Special And Important Reasons Exist For Granting A Writ Of Certiorari Because The District Court's Decision Granting Summary Judgment Is Consistent With The Applicable Decisions Of The Supreme Court.

As an alternative ground for granting his Petition, the Petitioner asserts that the courts below departed from the standards for summary judgment. However, the summary judgment entered by the District Court, and affirmed by the Sixth Circuit, was squarely within this Court's decisions setting forth guidelines for granting summary judgment, decisions ignored by Petitioner in his argument.

Contrary to Petitioner's assertions, this Court has noted that the procedural device of summary judgment, rather than a "disfavored procedural shortcut," is an integral part of the Federal Rules of Civil Procedure which assures not only a plaintiff's right to have those claims which are adequately based in fact tried to a jury, but a defendant's right to demonstrate prior to trial that the plaintiff's claims have no basis in fact. *Celotex Corp., v. Catrett,* 477 U.S. 317, 327 (1986). *Accord Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). Summary judgment is to be awarded to the moving party when the non-moving party fails "to make a sufficient showing on an essential element of [his or] her case with respect to which [he or] she has the burden of proof." *Celotex,* 477 U.S. at 323. Should the non-moving party fail to make a sufficient showing, the court must determine that no genuine issue as to material fact exists, "since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts

immaterial." *Celotex*, 477 U.S. at 323. The fact that a non-moving party produces some evidence in support of his case is insufficient to avoid summary judgment. *Anderson*, 477 U.S. at 249-51.

In the case below, the District Court held that Petitioner failed to make a sufficient showing that he was rejected under circumstances giving rise to an inference of discrimination, an essential element of his *prima facie* case with respect to which he had the burden of persuasion. *Burdine*, 450 U.S. at 253. Thus, the District Court's determination correctly followed and applied the standards for summary judgment enunciated by this Court. Petitioner, nonetheless, is attempting to avoid the result of this correct application by asserting a conflict in the courts of appeals over the method for proving pretext in age discrimination cases, and by arguing that the District Court improperly granted summary judgment in this case. Petitioner's attempts, however, are misguided.

As is clear from a review of the District Court's opinion, reproduced in the Appendix to the Petition, the issue of whether Petitioner raised sufficient evidence of pretext to avoid summary judgment was never reached in this case. That is because the Court found that Petitioner failed to present sufficient evidence to meet his initial burden of presenting a *prima facie* case of discrimination, the first stage of the *McDonnell Douglas* three stage analysis. Thus, the method by which a plaintiff in the Sixth Circuit can establish that his employer's reasons for rejecting him for promotion are pretextual is not an issue properly before this Court.

Had it been necessary for the District Court to have reached the pretext issue in the case below, the existence of a split of authority over the manner of proving pretext

would be irrelevant, nonetheless. This is because Petitioner presented no *evidence,* apart from conclusory allegations, to the courts below that the reasons given by Respondent for rejecting Petitioner for the position of Coordinator, DCT, DE, OWA, OWE were untrue. The alleged evidence raised in his Petition, apart from the fact that he was a teacher for 25 years, was never presented to the District Court. Petitioner's conclusory allegations—that the candidate ultimately selected did not meet the qualifications of the posting for the position in question and that Petitioner was the most qualified of all the candidates selected, each of whom was a teacher/coordinator like Petitioner—are contrary to the record evidence presented by Respondent in its motion for summary judgment and have no basis in fact.[2]

As for Petitioner's so-called direct evidence of age discrimination, the courts of appeals have correctly noted that an ambiguous age-related comment, such as the one allegedly made by the chairman of the selection committee, is insufficient to support a finding that age was a motivating or determining factor in an employment related decision. *See, e.g., Grubb v. W.A. Foote Memorial Hosp., Inc.,* 741 F.2d at 1498; *Ballinger v. North Carolina Agricultural Extension Service,* 815 F.2d 1001, 1006 (4th Cir.), *cert. denied,* _____ U.S. _____, 108 S. Ct. 232 (1987).

[2] Petitioner's selective inclusion in the appendix of only one part of the record is a gross distortion of what the full record contains. Not only was it established that academic certification is irrelevant for the position in question, but of the 25 certifications listed for Petitioner in the appendix, only four were in effect at the time he was considered by the screening committee. In addition, the record evidence disclosed that none of the applicants had vocational supervisory certification, as experience in a vocational supervisory position was a requirement for such certification. Finally, it was undisputed by Petitioner in the courts below that the three candidates selected by the screening committee over Petitioner were qualified for the job.

Petitioner is attempting to accomplish with this Court that which he could not accomplish in the courts below: to avoid summary judgment and proceed to trial before a jury based upon mere conclusory allegations, unsupported by evidence, that he was better qualified for the Coordinator position than the three finalists selected. The District Court's opinion amply demonstrates how Petitioner utterly failed to comply with the Federal Rule 56(e) requirement that evidence setting forth specific facts showing there is a genuine issue for trial must be presented by the non-moving party confronted with a properly supported motion for summary judgment. Fed. R. Civ. P. 56(e). As in the courts below, Petitioner's attempt here must fail.

Petitioner's suggestion that the minimal evidence he presented in response to Respondent's summary judgment motion is typical of the kind of evidence presented in age discrimination cases which proceed to trial is a gross distortion of the record in the courts below. Rather, the evidence supporting Petitioner's claim can at best be described as a mere scintilla of evidence, which amount has been declared by this Court as insufficient to withstand a motion for summary judgment. *Anderson, supra* at 249-51. As this Court held in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289-90 (1968) in the context of an antitrust case, but equally applicable to age discrimination cases:

> . . . To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of their allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the

> importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

Accord Anderson, 477 U.S. at 256-257. *See also Oliver v. Digital Equipment Corp.*, 846 F.2d 103, 109 (1st Cir. 1988); *Goldberg v. B. Green and Co., Inc.*, 836 F.2d 845, 848 (4th Cir. 1988); *Klein v. Trustees of Indiana University*, 766 F.2d 275, 282 (7th Cir. 1985); *Foster v. Arcata Associates*, 772 F.2d 1453, 1459 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986).

Petitioner's argument that he was deprived of the opportunity of demonstrating pretext through cross-examination at trial is, likewise, specious. Respondent did not move for summary judgment until after the close of discovery where Petitioner took advantage of the opportunity to extensively cross-examine upon deposition each of the selection committee members.[3] Further, the acceptance of Petitioner's argument would effectively require the elimination of summary judgment and require trial in even the most meritless claims. Such a result is clearly contrary to the requirement of Federal Rule 56(e) that rather than speculate about what could be elicited during cross-examination at trial, Petitioner

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[3] The deposition testimony of the selection committee members demonstrated that they possessed a good faith belief that the three recommended candidates possessed greater communication and organization skills, and greater leadership than Petitioner and, hence, were more qualified for the position. Petitioner elicited no facts during discovery by way of cross-examination or otherwise to indicate that these beliefs were not so held.

must "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250. When a non-moving party fails to come forward with specific facts, as Petitioner failed to do in this case, Federal Rule 56 requires that summary judgment be awarded to the moving party. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 323.

Thus, the District Court's decision in this case is entirely consistent with the decisions of this Court which set forth the well-established principles for determining when summary judgment is appropriate. As such, there is no reason for the Court to review the decision below.

III. Petitioner's Attempt To Charge The District Court With Creating Improper Presumptions Is Unfounded.

Petitioner's final argument in his attempt to demonstrate that summary judgment was improperly granted is that the District Court weighed evidence regarding the ages of the selection committee members and two of the final candidates for the position, thereby creating a presumption that the selection process was non-discriminatory. As he did in the Court of Appeals in an attempt to overturn the District Court's judgment, the Petitioner confuses the act of weighing evidence with that of assessing whether the non-movant has presented sufficient evidence on an essential element of his case to avoid summary judgment. As is clearly demonstrated in the District Court's opinion, the Petitioner failed to present sufficient evidence from which a jury could reasonably infer that he had been rejected under circumstances giving rise to an inference of discrimination, an essential element of Petitioner's *prima facie* case. A review of the opinion provides no indication that the District Court either improperly weighed the evidence or created the presumptions claimed by Petitioner. Thus, Petitioner's suggestion that the decision by the District Court is the first step in a process of undermining effective enforcement of the ADEA is utterly without foundation.

CONCLUSION

The courts below correctly applied the standards developed by this Court for analyzing cases alleging discrimination in employment. Following this Court's guidance in recent decisions, the District Court correctly applied the proper standard for ruling upon motions for summary judgment. Therefore, as no special and important reasons exist for this Court to review the decision of the District Court or the Court of Appeals, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DEAN E. WESTMAN, *Counsel of Record*
SUE M. DOUGLAS
BUCKINGHAM, DOOLITTLE & BURROUGHS
A Legal Professional Association
P.O. Box 1500, 50 South Main Street
Akron, Ohio 44309
(216) 376-5300
Attorneys for Respondent
Akron Board of Education